COMMENT

TORT AND TERMS OF CONTRACT

This article examines whether it is possible to qualify a tortfeasor's duty of care in negligence by the terms of a contract to which he is not a party.

I. The Problem In Perspective

THE basic question can be simply stated: is it at all possible for a tortfeasor' s duty to be regulated by his contractual obligations? If the tortfeasor, C and the injured party, A are both parties to a contract that limits the tortfeasor's liabilities, then the tortfeasor can rely on these limitations to his duty of care.[1] The problem only arises when these terms limiting the duty of C, the tortfeasor is found in the A-B main contract or B-C sub-contract. A possible solution which has been endorsed by the courts is to find an implied contract between the tortfeasor, C and the injured party, A incorporating these terms.[2] The real difficulty, however, arises when no such implied contract can be found as in *Junior Books* v. *Veitchi*[3] and *The Aliakmon.*[4] In *Junior Books,* the implied collateral contract argument was not raised presumably because Scot law does not recognise such a device. In *The Aliakmon,* financial difficulties on the buyers' side necessitated a variation of the c. and f. contract of sale changing it in the view of the House of Lords into an ex-warehouse contract which not only prevented the usual transfer of the contractual rights of suit in the carriage contract to the buyers as provided for in section 1 of the Bills of Lading Act 1855 but an implied contract from arising between the buyers and shipowners as there was no consideration from the buyers because they acted as agents for the sellers in presenting the bill of lading, paying the discharging costs and taking delivery of the goods. A central question then in these two cases is whether there are any other principles to regulate the tortfeasor's duty by his contractual obligations as all the judges agreed that in these circumstances it would be unfair to impose on the tortfeasor a higher duty in tort than in contract. If the complaint is that of a negligent breach of contract then it would indeed be unfair to ignore the terms of the contract as

[1] Section 13 of the Unfair Contracts Terms Act 1977 makes clear that such limitations on the duty of care are covered by the Act. In particular, section 2(1) imposes a total ban where the negligence complained of causes death or personal injury.
[2] See *The Eurymedon* [1975] A.C. 154 and *The New York Star* [1979] 1 Lloyd's Rep. 298.
[3] [1983] A.C. 520.
[4] [1986] 2 W.L.R. 902.

they must be relied upon in totality to prove the tort.[5] English courts however do not recognise a negligent breach of contract as a species of tort.[6] However if an independent tort is involved, for example that of a voluntary assumption of responsibility which has been suggested by the courts as a possible basis for *Junior Books,*[7] then it would only be unfair if it can be shown that A was somehow bound by these contractual terms, so that it would be unfair to allow him to ignore them. If it was otherwise, then it cannot be unfair as it is well-established that C's duty may be more or less onerous than his contractual duty to A or B as the tort is independent of the contract. For instance, in *Haseldine* v. *Daw*[8] the defendant engineers had negligently repaired B's lift, thereby causing a visitor, A to be injured. Their argument that it is "not right that a repairer who, as in the present case, has stipulated with the person who employs him that he shall not be liable for accidents, should not the less be made liable to a third person" was rejected on the ground that the "duty to the third party does not arise out of contract, but independently of it." The question then must be whether it can be shown that A, the injured party was indeed bound by these contractual terms in an independent tort situation as to make it unfair for him to impose a higher duty in tort than in contract on the defendant. Put in another way, it comes back to the basic question posed at the beginning: is it at all possible for a tortfeasor's duty to be regulated by his contractual obligations?

II. The Defence Of Consent

In Junior Books, what separated the judges was that the minority held that it was not possible to qualify a tort action by the terms of the contract and that this was in itself a policy reason negativing the very existence of the duty while the majority appeared to accept that it is possible in principle to do so. In that case, as would be recalled, the complaint was that the factory floor laid by the subcontractor was defective and the factory owner instead of suing the main contractor chose to sue the subcontractor. This raised the issue of the standard of care which the subcontractor owed the owner as his contractual obligation to the main contractor was embodied in the subcontract.

Lord Brandon's[9] reason in rejecting in *Junior Books* that any such principle could be found was that a person cannot take the benefit or be bound by the terms of a contract to which he is not a party. While accepting that the content of the subcontractor's tort duty, if any, must, if recognised, be determined by reference to the subcontract, the problem as he perceived it was that the defendant's contract was with the main contractor not the plaintiff, and the plaintiff's contract was with the main contractor. So how could the plaintiff

5 See *The Aliakmon* [1985] 1 Q.B. 351 at 396 where Robert Goff, L.J. (as he then was) said that it was "unthinkable" if the plaintiffs complaint had been that defendant had negligently breach the carriage contract to ignore its terms.

6 See *The Aliakmon* [1986] 2 W.L.R. 902 where Lord Brandon for the House cited a long list of authorities against such a tort action.

7 See *Muirhead* v. *ITS* [1986] Q.B. 507*, A-G of Hong Kong* v.*Yuen Kun-yeu* [1987] 2 All E.R. 705*, D & F Estates* v. *Church Commissioners of England* [1988] 2 All E.R. 992, Simaan v. *Pilkington* [1988] 1 All E.R. 557, *Greater Nottingham Co-operative Society* v. *Cementation Piling and Foundations* [1988] 2 All E.R. 971.

8 [1941] 2 K.B. 343.

9 [1983] A.C. 520 at 552.

and defendant be bound by these two contracts to which they were not parties? Lords Fraser and Roskill's argument that the plaintiff was bound by the terms of the subcontract as he had full knowledge of the terms made no difference to the principle that a third party to a contract cannot be bound by it. In *The Aliakmon,* Lord Brandon giving the only judgment of the House reaffirmed this view. But, it is submitted, privity of contract is simply irrelevant to a third party's action in tort. Whether the third party can take the benefit or be bound by the contract turns not on contractual principles but must be found in tort.

This is illustrated by the fact that even when C and A are parties to the contract, be it in an express or implied contract, the exemption clauses are effective not because of the doctrine of privity but because the defence of consent can be sustained on the ground that an express or implied contract between the parties supports the argument that A had voluntarily agreed to the limitations on C's duty of care. It follows therefore that regardless of the doctrine of privity, even when there is no contract between A and C, A can be bound if it can be shown that A has consented to C's limited duty of care. This is not a novel notion in law but a well-established principle in cases of bailment. In *Morris* v. *C.W. Martin,*[10] *a* key issue which had to be decided was whether the defendants could rely on the exemption clauses although there was no contract directly between the parties and the plaintiff had no knowledge of these terms. The facts were these. The plaintiff sent a mink stole to a furrier to be cleaned. With the plaintiff's consent, the furrier, who did no cleaning himself delivered the fur to the defendants to be cleaned for reward. The contract between the furrier and the defendants, which was made by the furrier as principal and not as agent for the plaintiff contained exemption clauses. While the fur was with the defendants, it was stolen by one of their servants whose duty it was to clean the fur. Lord Denning[11] said *obiter* that the owner is bound by these exemption clauses if he has expressly or impliedly consented to the bailee making a sub-bailment containing those conditions, but not otherwise. Two subsequent bailment cases -*Johnson, Matthey* v. *Constantine Terminals*[12] and *Singer* v.*Tees andHartlepool Port Authority*[13] - have endorsed Lord Denning's view. Notably, Mr. Justice Donaldson (as he then was) in *Johnson, Matthey* appeared to extend Lord Denning's ruling by saying that if the cause of action depended on the plaintiff proving the bailment then the plaintiffs are bound by all the terms of the bailment. But this reasoning cannot be extended to contract terms in general as it would amount to recognising a negligent breach of contract as a tort in itself. This objection, however, does not apply to Lord Denning's ruling and there appears no reason why its reasoning cannot be applied by analogy to contract terms in general. Lord Denning in *Midland Silicones* v. *Scruttons*[14] said as much:

> "Even though negligence is an independent tort, nevertheless it is an accepted principle of the law of tort that no man can complain of an injury if he has voluntarily consented to take the risk of it on himself. This consent need not be embodied in a contract.Nor does it need consideration to support it, suffice that he consented to take the risk of injury to himself."

10 [1966] 1 Q.B. 716.
11 Ibid. at 729-730.
12 [1976] 2 Lloyd's Rep. 215.
13 [1988] 2 Lloyd's Rep. 164.
14 [1962] A.C. 446 at 488 and 492.

In fact, there are cases that suggest that this principle has already been extended to non-bailment cases. *Hedley Byrne* v. *Heller*[15] is a case in point. *Hedley Byrne* can be regarded as a three party situation. The defendant bank gave the information to the plaintiff's bank, not the plaintiff, but it was the plaintiff who can be regarded as a stranger to the contract, if any, between the defendant and the bank who sued. The tort action by the plaintiff failed because the disclaimer of responsibility by the defendant was held by the House of Lords to negative the duty of care owed to the plaintiff. The expansion of liability to a three party situation, however, raises the issue of the effectiveness of such disclaimers as it may be impossible to bring the notice of the disclaimers to the third party plaintiff. A general rule in tort is that a unilateral intention to disclaim responsibility is ineffective as when a motorist knocks down a pedestrian. The difference, it is suggested, between *Hedley Byrne* and that of the pedestrain is the element of voluntary consent. In *Hedley Byrne,* it was effective because the plaintiff impliedly authorised his bank to accept the risk of an unreliable statement by the defendant. In other words, by consenting to the disclaimer, he exempted the defendant from his duty of care. In contrast, in the pedestrian situation where no such consent can be shown, the disclaimer clearly should be ineffective.

More recently, in *Southern Water Authority* v. *Carey,*[16] a principal issue was the effect of a clause in a building contract (which expressly provided that the main contractor's subcontractors would benefit from the limitations of liability in contract or tort embodied in the building contract) on a tort action against the subcontractors. The judge declined to extend the unilateral offer argument in *The Eurymedon* outside the special area of shipping as the Privy Council's construction in that case did not really fit the facts. Further there was no evidence in this case that the main contractor acted as the subcontractors' agent. As for Lord Denning's consent argument in *Midland Silicones,* his lordship could not apply it as it is only dicta. He then approached the case on the basis of the two-stage test in *Anns* v. *Merton LBC.*[17] Though the *Anns* test is now out of favour, what is interesting for our purpose is that having found that there was sufficient proximity to raise a *prima facie* duty of care, his lordship went on to say that because the plaintiff had agreed in the building contract that the subcontractors' liability was to be limited, this constituted a policy reason to reduce the subcontractors' liability. But this is really another version of the consent argument except that he arrived at it through the *Anns* test.

The relevant question then in cases like *Junior Books* and *The Aliakmon* so far as the effect of contract terms on the tort action is concerned, is not privity but whether A, the injured party had consented to the restriction of the tortfeasor's (C) duty. There is no problem in establishing consent in a main contract which expressly extends the protection of the exemption clauses to the subcontractor. A by the very act of agreeing to be a party to the main contract could be taken as consenting to limit the scope of C's duty as specified in the A-B contract. *Elder, Dempster* v. *Paterson, Zochonis*[18] could as Lord Denning[19] said in *Midland Silicones* be explained on this ground. In that case, the House held that the

15 [1964] A.C. 465.
16 [1985] 2 All E.R. 1077.
17 [1978] A.C. 728.
18 [1924] A.C. 522.
19 [1962] A.C. 446 at 488.

defendant shipowner could take the benefit of an exemption clause in a contract between the plaintiff owner of the damaged palm oil and the charterer even though the shipowner was a stranger to this contract. Lord Denning argued that since the bill of lading, made between the plaintiff and the charterer purported to protect both the charterer and the shipowner from claims arising out of bad stowage, "the shipper, by exempting the charterers from bad stowage, may be taken to have consented to exempt the shipowner also." *Elder, Dempster* could therefore be explained not on a new principle of vicarious immunity of agents (agents to enjoy automatically as a matter of law the protection afforded to its principal under the contract) but on the well-established principle of consent. Obviously, this argument can apply to the case where the exemption clause is in the subcontract rather than the main contract. Ideally, if A knows about the terms of the subcontract but nevertheless instructs the main contractor to employ the subcontractor, then he must have chosen to accept the subcontractor's terms in restricting C's duty of care.

But what if the main contract does not expressly extend its benefit to the subcontractor or where A does not know the terms of the subcontract? In such a case, by analogy to the bailment rule in *Morris* v. *C.W. Martin,* it could be argued that where it is known or foreseen that the task will, or may not be performed by B personally, but must, or may involve subcontractors, A could be taken to have impliedly consented to B extending the protection afforded to B in the main contract to C or to make a subcontract on these terms. For instance, the only reason why in the stevedore cases, A, the cargo-owners cannot sue C, the stevedores in trespass is because A have impliedly consented to the shipowner, B to allow C to handle their goods. If implied consent can reduce an action in trespass and in bailment for an action in negligence, why not in general? In *Mayfair Photographic* v. *Baxter Hoare,*[20] a sub-carrier, C was sued in negligence by the owner of goods, A who had entered into the carriage contract with, B. Mackenna, J. held that the sub-carrier who acts on instruction within the main carrier's ostensible authority owes no duty beyond adherence to the terms of the contract of subcarriage. In this case, carrying the plaintiff's cameras in an open lorry without an immobilizer and a mate in the lorry were all within the terms of the subcontract. In other words, the owner, A by entering into a contract with the forwarding agent, B under which it is contemplated that B would enter into a subcontract to transport the goods, could be taken as impliedly consenting to the terms of the subcontract even thought he is not a party to the subcontract. In short, there cannot be negligence to do that which was impliedly consented to by the goods owner.

III. Junior Books And The Aliakmon Reconsidered

If the consent argument is accepted, then it would provide a solution to the terms of contract problem in *Junior Books* and *The Aliakmon.* In *Junior Books,* the plaintiff not only knew the terms of the subcontract but had actually nominated the subcontractor and therefore could be taken as having consented to the terms. This could explain why Lord Fraser said referring to the terms in the subcontract that there is no problem here as the plaintiff had full knowledge of the terms. Lord

[20] [1972] 1 Lloyd's Rep. 410.

Roskill, however, referred to the position where there is a relevant exclusion clause in the main contract and held that it was possible to negative such a claim as in the disclaimer in H*edley Byrne.* But, as Lord Brandon pointed out in *The Aliakmon,* the problem in these cases is the relevance of an exclusion clause in a contract in which the defendant is a party and not the plaintiff (i.e. the subcontract in *Junior Books* and the contract of carriage in *The Aliakmon)* whereas Lord Roskill's observation was concerned with the converse situation where the plaintiff but not the defendant was a party to the contract and as such it was not a "convincing legal basis for qualifying a duty of care owed by A to B by reference to a contract to which A is, but B is not, a party." However in *Muirhead* v.*ITS,*[21] Robert Goff, L.J. "cannot but think that Lord Roskill was, like Lord Fraser of Tullybelton, intending to refer to what was in the particular case a sub-contract with the nominated sub-contractors, treating it as the main contract under which the relevant services were in fact performed." This observation is sustainable as it is odd that if Lord Roskill was indeed talking about Himalaya clauses that he should ignore those stevedore cases - *The Eurymedon* and *The New York Star* - dealing with their effect on a tort action. If Robert Goff, L.J. is right that Lord Roskill actually meant to refer to the subcontract, then the argument follows - the subcontract terms can limit the duty of care because the owner knew about them and had consented to them. Similarly in *The Aliakmon* the c. and f. buyer was bound to the terms of the contract of carriage because he knew and in fact required the c. and f. seller under the c. and f. contract of sale to enter into a contract of carriage with the shipowner on the usual terms, which invariably included the Hague Rules, and as such could be taken as impliedly consenting to these terms. In these circumstances, it would be unfair to impose on the defendant - be it the subcontractor *in Junior Books* or the carrier in *The Aliakmon* - a higher duty in tort than in contract.

IV. Concluding Remarks

A principal policy objection to tortious recovery for pure economic loss is the argument that no way can be found to limit the duty owed by C to A by reference to the terms of contract between A and B or B and C. This article shows that the consent argument can meet this objection. Presently the law recognises this argument in limiting a duty of care where physical damage is concerned and even it appears where pure economic loss caused by negligent misstatement is involved. To disallow this principle where negligent acts causing pure economic loss is concerned, is to preserve distinctions between them that is not only difficult to justify but difficult to apply.

RAYMOND LIM SIANG KEAT*

[21] [1986] 1 Q.B. 502 at 525.

* B.Econ.(Adel.), B.A (Oxon.), LL.M.(Cantab.), Lecturer, Faculty of Law, National University of Singapore.